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IN THE

Supreme Court of the United States

OCTOBER TERM, 1944

No. 176

THE STATE OF NORTH DAKOTA,
Petitioner,

vs.

RAPHAEL JEROME SZARKOWSKI.

PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT AND BRIEF IN SUPPORT THEREOF

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PETITION FOR A WRIT OF CERTIORARI TO THE CIRCUIT COURT OF APPEALS FOR THE EIGHTH CIRCUIT

The Attorney General of the State of North Dakota, for and on behalf of the State of North Dakota, prays that a Writ of Certiorari issue to review the judgment of Circuit Court of Appeals for the Eighth Circuit entered in the above case on April 19th, 1944, affirming the order of the District Court for the District of North Dakota of August 5th, 1943.

OPINIONS BELOW

The District Court wrote no opinion. The opinion of the Circuit Court of Appeals is reported in 141 F. (2d) ....

JURISDICTIONAL STATEMENT

The judgment of the Circuit Court of Appeals sought to be reviewed was entered on April 19th, 1944. The jurisdiction of this court is invoked upon two grounds:

1. The court below, by its judgment, has applied Section

75 (s) of the Bankruptcy Act (49 Stat. 943-945) so as to take petitioner's property without due process in violation of the Fifth Amendment to the Constitution of the United States.

2. The court below has so applied the act above referred to as to deny to the State of North Dakota acting in its sovereign capacity as trustee of the permanent school funds arising from the land grant made by the Enabling Act, approved February 22nd, 1889, the protection of the contract or compact existing between the United States and the State of North Dakota by reason of the acceptance of said land grant and the constitutional guaranty of the protection and administration of said fund. (Enabling Act, 25 U. S. Stat. at Large, p. 676, Article IX, Constitution of North Dakota.) The Circuit Court of Appeals, by its judgment sought to be reviewed, has decided two important questions of Federal law, which have not been, but should be, settled by this court.

QUESTIONS PRESENTED

Two questions are presented:

1. May a farmer-debtor bankrupt redeem from a foreclosure sale certificate holder for a less amount than provided by law of state where foreclosure was made, thereby depriving such certificate holder of his property without due process of law?

2. Are not Congress and the Legislature of the State of North Dakota equally bound by a contract or compact existing between the Federal Government and the State of North Dakota, by reason of the grant of public lands for school purposes made by the Federal Government and the acceptance of such grant by the State and its guaranty to protect and administer the funds arising from the sale of such lands as a trust fund?

STATUTES INVOLVED

Enabling Act, approved February 22nd, 1889 (25 Stat. at Large 676), Articles IX and XVI (Sec. 205), North Dakota Constitution, and Section 75 (s) of the Bankruptcy Act (49 Stat. 943-945).

STATEMENT

On March 19th, 1937, the State loaned Joseph M. Szarkowski, brother of the debtor herein, $3,200.00 of the permanent school funds of the State, derived from sale of lands granted by the United States to the State for support of the public school system by the Enabling Act under which the State was admitted to the Union. The loan was secured by a first mortgage on certain farm lands. Before the loan was completed, and without notice to the State, Joseph deeded these lands to his eighteen-year-old brother, Raphael, the debtor herein. No part of the loan or interest was paid and the State foreclosed and bid in the land for $3,863.20, the full amount due on the secured debt. The State held the certificate of foreclosure sale issued on such foreclosure at the time this bankruptcy proceeding was commenced. The property was valued by the Conciliation Commissioner at $1,300.00, and the debtor's right to redeem at that amount is fixed by the judgment we are now seeking to review. By the law of North Dakota, redemption may be made by the mortgagor or any subsequent lienholder by paying the purchase price with interest at six (6) per cent to date of redemption. (Secs. 8085, 7754, Compiled Laws 1913; Ch. 211, Laws 1933.) Foreclosure sale was had January 21st, 1942. By such a redemption for $1,300.00 the school fund will suffer an immediate loss of over $3,000.00; for, if no redemption were made, the State could hold the land until it could be sold for the amount invested in it.

REASONS FOR GRANTING WRIT

On its appeal to the Circuit Court the State urged the two propositions:

1. Redemption from holder of foreclosure sale certificate cannot be made for less than amount fixed by state law without depriving the certificate holder of his property without due process in contravention of the Fifth Amendment to the Constitution of the United States.

2. Congress, not having expressly so provided, cannot be held to have intended by Section 75 (s) of the Bankruptcy Act to so apply the law as to violate the contract or compact existing between the Federal Government and the State by reason of the land grant made by the Enabling Act and the acceptance thereof under the conditions and limitations of the grant by its Constitution.

The Circuit Court of Appeals, as we read its opinion, holds that both of these questions have already been determined conclusively by the Supreme Court adversely to the State, your petitioner. With all respect due to the court, we just as firmly assert that neither of these questions has ever been determined by this court and particularly not by the cases cited in its opinion by the Circuit Court.

The Supreme Court, in *Louisville Joint Stock Land Bank vs. Radford*, 295 U. S. 555, 79 L. Ed. 1593, 55 S. Ct. 854, 97 A. L. R. 1106, distinctly and unequivocally held that "the bankruptcy power, like the other great substantive powers of Congress, is subject to the Fifth Amendment." And in that case, as well as in all subsequent cases considered by the Supreme Court, the court was considering only the rights of a mortgagor and a mortgagee under a subsisting mortgage. In this case, there is no mortgage involved, since by the foreclosure sale the mortgage debt has been fully paid and now

the only rights involved are those of purchaser and redemptioner. *Harrison vs. Griffin*, 32 N. D. 188, 196, 155 N. W. 655, 657; *North Dakota Horse and Cattle Co. vs. Scrumgard*, 17 N. D. 466, 490, 117 N. W. 453, 463. The purchaser now holds a property right in the land, and not simply a lien thereon. This property right can only be taken away by due process of law, and that due process is by the exercise of the statutory right of redemption. And in no case has this court considered the question of the respective rights of Congress and the State Legislature under the contract or compact above referred to. That such a contract or compact exists is distinctly held by several State Courts.

State vs. Whitney, 66 Wash. 473, 120 Pac. 116, 121.

Newton vs. State Board of Land Commissioners, 37 Idaho 58, 219 Pac. 1053.

Magnolia Petroleum Co. vs. Price, 86 Okla. 105, 206 Pac. 1033, 1036-7.

City of Corinth vs. Robertson, 125 Miss. 31, 87 So. 464.

Erickson vs. Cass County, 11 N. D. 494, 506, 92 N. W. 841.

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And many states have as conclusively held that such compact may not be violated by the State Legislature.

Erickson vs. Cass County, supra.

State vs. Divide County, 68 N. D. 708, 283 N. W. 184.

State vs. Towner County, 68 N. D. 629, 283 N. W. 63.

Murtaugh vs. C., M. & St. Paul Ry. Co., 102 Minn. 52, 112 N. W. 860.

Newton vs. Weiler, 87 Mont. 164, 286 Pac. 133.

O'Brien vs. Wilson, 51 Wash. 52, 97 Pac. 1115.

State vs. Whitney, supra.

United States vs. Fenton, supra.

In view of the fact that other cases are now pending in which these questions are involved, and, since Congress has recently extended the life of Section 75 of the Bankruptcy Act, others are apt to arise since the State has millions of dollars of its school funds invested in farm mortgage loans, it is of considerable importance that these questions be finally determined by this court.

CONCLUSION

The decision below, we believe, erroneously determines questions which, when applied to this case and others now pending, results in an arbitrary taking from the State a considerable amount of the trust fund given it by the Federal Government without due process of law and in violation of a compact which binds both Congress and the Legislature to protect the fund. Therefore, we believe that this petition for a Writ of Certiorari should be granted.

May 18th, 1944.

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